

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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date: December 19, 2008

to: Frank A. Falvo
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(Small Business/Self-Employed)

from: Nancy Galib
Senior Technician Reviewer, Branch 4
(Procedure & Administration)

subject: Appeal and Suit Rights Under the Coal Excise Tax Refund Provisions Enacted in the Energy Improvement and Extension Act of 2008

This Chief Counsel Advice responds to your request for assistance dated December 2, 2008. This advice may not be used or cited as precedent.

I.R.C. § 4121 imposes an excise tax on the sale of coal from mines located in the United States. Section 114 of the Energy and Improvement Extension Act (EIEA) of 2008, enacted October 3, 2008, provides that a coal producer or coal exporter may file a claim for refund for tax paid under I.R.C. § 4121 not later than 30 days after October 3, 2008. The Act further provides that the Secretary shall determine whether the claim shall be paid not later than 180 days after the claim is filed. See IRS Announcement 2008-103, 2008-46 I.R.B. 1161. You asked whether taxpayers making a claim for refund under this new provision are entitled to an appeal if the IRS disallows the claim.

ADMINISTRATIVE APPEAL

A taxpayer may request that Appeals reconsider a claim for refund that was previously disallowed. See IRM 8.7.7.12, Reconsideration of Disallowed Claims in General. The general procedures for examining returns, issuing preliminary letters, and referring cases to Appeals apply in the case of excise tax refund claims. See IRM 4.24.8.12.1, General Excise Claim Procedures; IRM 4.24.10, Excise Tax Examination Reports, Case Closing and Appeals Procedures.

Treas. Reg. § 601.106(a)(1)(ii) provides that Appeals has exclusive and final authority for the determination of certain federal excise taxes. Treas. Reg. § 601.106(a)(3) provides that the authority vested in Appeals "does not extend to the determination of

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liability for any excise tax imposed by subtitle E or by subchapter D of chapter 78, to the extent it relates to subtitle E." The coal excise tax is in Chapter 32 of Subtitle D and therefore does not fall within that exception to Appeals' authority.

Treas. Reg. § 601.105(e)(2) states that when claims for refund are examined by the Examination Division, substantially the same procedure is followed (including appeal rights afforded to taxpayers) as when taxpayers' returns are originally examined. Treas. Reg. § 601.106(d)(2)(ii) provides that if a claim for refund is disallowed in full or in part by Appeals and the taxpayer does not sign a waiver of notification of claim disallowance, Appeals will issue a notice of claim disallowance. Subsection (e) of section 114 of EIEA requires that the IRS determine whether the taxpayer is entitled to a refund not later than 180 days after the claim for refund is filed. A taxpayer must request that Appeals reconsider the claim disallowance within the time period for filing a refund suit in district court.

Although Appeals reconsideration of a refund claim disallowance is not statutorily required, we do not find any basis to distinguish coal excise tax refund claims based on section 114 of EIEA from other refund claims for purposes of administrative appeal. We conclude that a taxpayer may request that the IRS reconsider a disallowance of a coal excise tax refund claim.

REFUND SUIT IN DISTRICT COURT

I.R.C. § 7422(a) prohibits any suit or proceeding in any court for a refund of taxes unless a claim for refund has been filed with the Secretary, "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." I.R.C. § 6532 provides that a refund suit under I.R.C. § 7422(a) may not be brought until six months after the date the claim for refund is filed unless the Secretary renders a decision within that time. The taxpayer has two years from the date the IRS mails the notice of disallowance to file a refund suit. Treas. Reg. § 301.6532-1.

When a taxpayer files a claim under section 114 of EIEA, such filing is according to the provisions of law. The IRS is required to render a decision on the claim within 180 days. Therefore, under I.R.C. §§ 7422 and 6532, a taxpayer who files a timely claim for refund that is disallowed or partially disallowed may file a refund suit in district court.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-3630 if you have any further questions.